IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 770 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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VIRAMJI MOHATJI THAKORE

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 770 of 1996

MR PK JANI for Appellant.

MR UR BHATT, ADDL.PUBLIC PROSECUTOR for Respondent

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 03/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374 of the Code of Criminal Procedure, 1973 is directed against judgment dated August 7, 1996, rendered by the learned Additional Sessions Judge, Mehsana, in Sessions Case No.95 of 1996, by which the appellant is convicted of the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer R.I. for life and fine of Rs.500/-, in default, R.I. for three months.

2. Deceased Manjuben Ramaji Thakor was married to Ramaji Mansangji Thakor before 8 years of the incident which took place on February 5, 1996 and was residing with her husband and three minor daughters at village Sundhia, Taluka : Kheralu, District : Mehsana. On February 4, 1996, a religious discourse was arranged in front of house of one Thakor Kavaji in the Maholla where house of deceased Manjulaben Thakor was situated. The appellant, who is neighbour and family nephew of the deceased, had approached the deceased and asked the deceased to submit to his sexual desires. The deceased had spurned the offer upon which the appellant had got enraged and annoyed. On the day of incident i.e.February 5, 1996, a quarrel had taken place between the appellant and the deceased, as the deceased had refused to submit herself to illegal and improper demands made by the appellant to have sex with her. At about 8.00 P.M. the appellant had gone inside the house of the deceased, who was sleeping with her three minor daughters, with a can containing kerosene. The appellant had poured kerosene over the deceased and set her ablaze. The deceased had put on polyester Sari which had caught fire immediately. Because of burn injuries, the deceased had raised shouts. Her husband Ramaji, who was not present, was also informed about the same and he with the help of othershad extinguished fire by covering the body of the deceased with a quilt. The deceased was thereafter removed to General Hospital, Visnagar for treatment. Dr.Bhogilal Amthalal, who was then Medical Officer of the Hospital, had treated her and noted history of assault as narrated by the deceased. The doctor had given telephonic information at Visnagar Police Station, which was noted down by P.S.O. of the Police Station. P.S.O. of the Police Station had sent a yadi to Executive Magistrate Mr.Rasiklal Jivabhai Patel and requested him to record dying declaration of the deceased. Accordingly, the Executive Magistrate had gone to the hospital and tried to ascertain from the doctor as to whether the deceased was conscious and in a fit state of mind to make statment

or not. The doctor, whose office was situated quite near the Ward in which the deceased was admitted for treatment, had examined the deceased and certified that the deceased was conscious and in a fit state of mind to make statement. The doctor had made necessary endorsement below the yadi itself which was addressed by the police officer in charge of Visnagar Police Station to the Executive Magistrate requesting him to record dying declaration of the deceased. The Executive Magistrate had also satisfied himself that the deceased was conscious and in a fit state of mind to make statement. Accordingly, the Executive Magistrate had recorded the dying declaration of the deceased in questions and answers form and obtained right hand thumb impression of the deceased after recording of dying declaration was over. The police officer in charge of Visnagar Police Station had infomred the 2nd Grade Jamadar Mr.Shambhuji Pradhanji that the deceased was admitted in Visnagar General Hospital for treatment of burn injuries and that appropriate steps should be taken by him. Accordingly, the 2nd Grade Jamadar had gone to General Hospital, Visnagar and recorded complaint of the deceased as narrated by her. In view of disclosure made by the deceased that the appellant had set her on fire after pouring kerosene over her, initially offence punishable under Section 307 I.P.C. was registered against him. The complaint lodged by the deceased was investigated by Mr.G.K.Desai, who was then P.I. of Kheralu Police Station because the offence had taken place within the jurisdiction of Kheralu Police Station. The investigating officer had drawn panchnama of place of occurrence as pointed out by Sartanji, who was brother of husband of the deceased. The investigating officer had also recorded statements of those persons, who were found to be conversant with the facts of the case. Meanwhile, the appellant had surrendered before the police on February 7, 1996 with a plastic Can which was smelling of kerosene and, therefore, the appellant was arrested; whereas the Can smelling kerosene was attached. As condition of the deceased had deteriorated, she was referred to Civil Hospital, Ahmedabad for better treatment. During the course of treatment, the deceased had succumbed to her injuries on February 11, 1996 and, therefore, offence punishable under Section 302 I.P.C. was registered against the appellant. The investigating officer had made arrangements for sending the dead body of the deceased to Civil Hospital, Ahmedabad for postmortem examination. The autopsy on the dead body of the deceased was held by a panel of doctors comprising Dr.Pratimaben Bharatkumar and Mr.B.B.Oza. The investigating officer had thereafter held inquest on the

dead body of the deceased and sent incriminating articles such as control earth seized from the place of incident plastic Can produced by the appellant etc. for analysis to Forensic Science Laboratory. On conclusion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate, First Class, Kheralu of the offence punishable under Section 302 I.P.C. As the offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Mehsana for trial, where it was numbered as Sessions Case No. 95 of 1996.

3. The learned Additional Sessions Judge, Mehsana, to whom the case was made over for trial, had framed charge against the appellant of the offence punishable under Section 302 I.P.C. at Exh.2. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Pratimaben Bharatkumar as PW.1 at Exh.9, (2) Ramaji Mansangji as PW.2 at Exh.11, (3) Patel Rasiklal Jivabhai as PW.3 at Exh.12, (4) Bakaji Sartanji as PW.4 at Exh.15, (5) Sartanji Mansangji as PW.5 at Exh.16, (6) Shambhuji Pradhanji as PW.6 at Exh.21, (7) Khodaji Bhikhaji as PW.7 at Exh.23, (8) Ghemarji Amaji as PW.8 at Exh.25, (9) Gandabhai Kalabhai Desai as PW.9 at Exh.26, and (10) Dr.Bhogilal Amthalal as PW.10 at Exh.28, to prove its case against the appellant. The prosecution also produced documentary evidence such as map of place of occurrence at Exh.8, postmortem notes at Exh.10, yadi sent to Executive Magistrate requesting him to record dying declaration of the deceased at Exh.13, dying declaration of the deceased recorded by Executive Magistrate at Exh.14, panchnama of place of occurrence at Exh.17, panchnama of person of the deceased at Exh.18, panchnama indicating seizure of clothes of the deceased at Exh.19, inquest report at Exh.20, complaint of deceased Manjuben as recorded by witness Shambhuji Pradhanji at Exh.22, arrest panchnama of the appellant at Exh.24, certificate indicating injuries sustained by the deceased which was issued by Dr.Bhogilal Amthalal at Exh.29 etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement

case of the appellant was that of general denial and in answer to last question the appellant contended that he was falsely involved in the case. However, neither the appellant examined himself on oath nor examined any other witness to substantiate his defence that he was falsely involved in the case.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that the husband of the deceased and other relatives of the deceased, to whom the deceased had narrated the incident, had deserted her because a compromise had taken place with the appellant, but the dying declaration made by the deceased in the form of history of assault narrated before Dr.Bhogilal as well as dying declaration recorded by Executive Magistrate Mr.Rasiklal Jivabhai Patel and complaint which was recorded by police constable Shambhuji Pradhanji and which was liable to be treated as her dying declaration after her death, were consistent, cogent as well as trustworthy which, in turn, established that two days prior to the date of incident the appellant had asked the deceased to submit herself to his sexual desire and on refusal by the deceased, the appellant was enraged, as a result of which on February 5, 1996 at about 8.00 P.M. the appellant had murdered her by pouring kerosene over her and setting her ablaze. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Section 302 I.P.C. and imposed sentence referredto above by judgment dated August 7, 1996, giving rise to instant appeal.

6. Mr.P.K.Jani, learned counsel of the appellant, contended that the evidence on record goes to show that bandage was applied on hands of the deceased, which makes the claim of the Executive Magistrate as well as that of the police officer that the deceased had put her right hand thumb impression on the dying declaration as well as on the complaint recorded by 2nd Grade Jamadar Shambhuji, thoroughly unreliable and, therefore, those dying declarations should not be acted upon by this Court. According to the learned counsel of the appellant, contents of panchnama Exh.18 indicate that the deceased was not able to speak at 11.30 P.M. and, therefore, claim advanced by the Executive Magistrate as well as by the police constable that the deceased was conscious and in a fit state of mind to make statement should be disbelieved by the Court. What was emphasised by the learned counsel of the appellant was that even if the Court were to come to the conclusion that the deceased was conscious and in a fit state of mind to make statement, dying declaration recorded by the Executive

Magistrate shows that the deceased was dragged out of the room where she was sleeping and thereafter the appellant had poured kerosene over her and set her ablaze, but no traces of kerosene were found outside her house and there being material discrepancy about the scene of offence, both the dying declarations should be rejected by this Court. What was maintained was that no independent witnesses were examined, though the incident is alleged to have taken place outside the house and, therefore, after drawing adverse inference against the prosecution, the judgment impugned should be set aside. It was argued that the testimony of Executive Magistrate establishes that he had to ask every question to the deceased twice which, in turn, further establishes that she was neither in a position to understand the questions nor in a fit state of mind to make statement and, therefore, the so-called dying declaration recorded by the Executive Magistrate should not have been relied upon by the learned Judge for basing conviction of the appellant under Section 302 I.P.C. The learned counsel pointed out that in the medical case papers the doctor had failed to note the time and date of arrival of Executive Magistrate at the hospital for recording dying declaration of the deceased and in absence of any such corroborative piece of evidence on record, dying declaration of the deceased recorded by the Executive Magistrate should have been disbelieved. It was asserted that the testimony of the head constable shows that he had gone to the hospital at 12.05 hours of February 6, 2006 for recording complaint of the deceased and had remained there upto 12.35 hours; whereas testimony of the Executive Magistrate also shows that he had gone to the hospital at 12.10 hours of February 6, 1996 for recording dying declaration of the deceased, and as the dying declaration of the deceased and her complaint could not have been recorded at the one and the same time, both the dying declarations should have been discarded by the learned Judge of the trial Court as thoroughly unreliable. According to the learned counsel of the appellant, the Head Constable has specifically stated in his testimony that he was in the hospital upto 12.35 hours of February 6, 1996, but, nobody had come near the deceased at all and, therefore, the assertions made by the Executive Magistrate that he had gone to the hospital and recorded dying declaration of the deceased should have been disbelieved by the Court of first instance. It was also argued that no endorsement was made by the doctor on the dying declaration of the deceased about the state of mind of the deceased and, therefore, having regard to the nature of injuries sustained by the deceased, the Court should have held that the deceased was not in a fit state of

mind to make statement and that her dying declaration as propounded by the Executive Magistrate was not a reliable piece of evidence. It was urged that the conduct of the appellant of running away with Can and producing the same before the police is highly improbable and, therefore, seizure of Can smelling kerosene should not have been taken into consideration by the trial Court as one of the circumstances established against the appellant. What was maintained was that the doctor was not present when dying declaration was recorded by the Executive Magistrate and, therefore, the dying declaration of the deceased should not have been used as a piece of evidence against the appellant. In the alternative, it was argued that the burn injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause her death, as the deceased had sustained 1st and 2nd degree burns over chest, both upper limbs, right thigh, face about 50%, whereas she had died after six days of the incident and as it was not the intention of the appellant to cause murder of the deceased, conviction of the appellant under Section 302 I.P.C. should be converted into one punishable under Section 304 Part-I or Part-II of the Indian Penal Code, as the case may be, and the punishment already undergone by him by this time should be imposed on him for commission of offence punishable under Section 304 I.P.C.

7. Mr.U.R.Bhatt, learned A.P.P., contended that though the close relatives of the deceased had deserted her, truth has come out in form of her dying declarations, which are cogent as well as trustworthy and, therefore, instant appeal should be dismissed. According to the learned counsel of the State Government, history of assault as narrated by the deceased before the doctor, which is referredto by the doctor in his substantive evidence before Court is not challenged by the defence at all and, therefore, conviction of the appellant must be sustained on the basis of said evidence which is of sterling quality. The learned counsel of the State Government emphasised that all the three dying declarations which are on record of the case are not only consistent with each other, but no major part of any of the dying declarations is demonstrated to be false with reference to other reliable evidence on record and, therefore, well-founded conviction of the appellant under Section 302 I.P.C. recorded on the basis of dying declarations should be upheld by this Court. It was argued that the plea that thumb impression of the deceased could not have been obtained either on the dying declaration recorded by the Executive Magistrate or on the complaint recorded by the 2nd Grade Jamadar has no

substance whatsoever because the record does not indicate that in fact the deceased had sustained any burn injury on the thumb on her right hand. What was argued was that neither the Executive Magistrate nor the Doctor, who had initially treated the deceased at Visnagar General Hospital, nor the 2nd Grade Jamadar who had recorded complaint of the deceased is shown to be on inimical terms with the appellant or interested in the deceased who was belonging to lower strata of the society and, therefore, there is no reason for the Court to discard their reliable testimony, which establishes that dying declarations of the deceased and/or complaint of the deceased as narrated by her was recorded by the Doctor, Executive Magistrate and/or police constable and that commission of offence by the appellant is satisfactorily proved by the prosecution. The learned counsel emphasised that, in fact, there is no discrepancy about the place of incident at all, inasmuch as osari is also a part of the house of the deceased and as no major part of the dying declaration is demonstrated to be false with reference to other evidence on record, the learned Judge of the trial Court did not commit any error in convicting the appellant of offence punishable under Section 302 I.P.C. According to the learned counsel of the State Government, cogent reasons have been given by the learned Judge for convicting the appellant of the offence punishable under Section 302 I.P.C. and as the learned counsel of the appellant has failed to dislodge them, the appeal should be dismissed.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. It is true that close relatives of the deceased have deserted her and not supported the prosecution case before the Court. There is no manner of doubt that the prosecution heavily relies upon three dying declarations made by the deceased, viz. (i) history of assault narrated by the deceased before Dr.Bhogilal Amthalal implicating the appellant as author of injuries sustained by her; (ii) dying declaration recorded by Mr.Rasiklal Jivabhai Patel, who was then Executive Magistrate, and (iii)complaint of the deceased which was recorded by 2nd Grade Jamadar Shambhuji Pradhanji and which is treated as her dying declaration after her death.

9. Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an

exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a persons is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can

only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true:-

(1) Was the victim in a position to identify the assailant/s?

(2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities?

(3) Whether any material part is proved to be false by other reliable evidence?

(See : (1) Khushall Rao v. State of Bombay (1958) SCR 552; (2) Tarachand Damu Sutar v. State of Maharashtra (1962) 2 SCR 775; (3) Kusa and Ors. v. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundulal Bala Subrahmaniyam and another v. State of A.P., (1993) 2 SCC 684; (5) Meesala Ramkrishna v. State of A.P., (1994) 4 SCC 181; (6) Govardhan Raoji Ghyare v. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7) Gangotri Singh v. State of U.P. 1993 Suppl. 1 SCC 387; (8) Smt.Paniben v. State of Gujarat, A.I.R. 1992 SC 1817; (9) State of Rajsthan v. Kishore, JT 1996 (2) SC 595; and (10) State of U.P. v. Ameer Ali, JT 1996 (4) SC 123,(11) Laxman v.State of Maharashtra, (2002)6 SCC 710).

10. In light of above principles, this Court will have to consider three dying declarations produced by the prosecution in instant case and ascertain the truth with reference to those dying declarations made by the deceased. Dr. Bhogilal Amthalal is examined as PW.10 at Exh.28. He has stated in his testimony that on February 5, 1996 he was on duty as Medical Officer of General Hospital, Visnagar and that at about 11.00 P.M. Smt.Manjulaben Ramaji Thakor was brought before him for treatment. The doctor has stated that when the deceased was brought before him for treatment, she was conscious and that he had asked the deceased to narrate history of assault. According to the doctor, the deceased had stated before him that the appellant, who was also a resident of village Sundhia, had poured kerosene over her and set her on fire. According to the doctor, he had

examined the person of Smt.Manjulaben and found that kerosene smell was coming from her body. On further examination the doctor had found following injuries:

Deep burns on ant.part of body chest, both upper arm & back of chest.
Right upper extremity totally involved in deep burns except hand.
Face and neck are involved in deep burns
Froth hair & head is burnt.

According to the doctor, right arm, except wrist, was severely burnt. The doctor was shown Exh.13, which was 'yadi' brought by the Executive Magistrate before him when the Executive Magistrate had come to the hospital for recording dying declaration of the deceased. According to the doctor, on production of the same before him, he had gone near the patient and examined the patient and that after finding that the deceased was conscious, had made an endorsement below Exh.13 stating the fact that the deceased was conscious. It was also stated by him that he had also mentioned the time and date while making endorsement below Exh.13. What was maintained by the doctor before the Court was that at the time when the Executive Magistrate had recorded dying declaration of the deceased, the deceased was conscious and was capable of giving answers.

In cross-examination, it was stated by the doctor that his Residential Quarter is situated in the compound of the hospital and that he was on duty at the relevant time. The doctor had informed the Court that he was present in the hospital when the Executive Magistrate had come to record dying declaration of the deceased. What was maintained by the doctor was that in fact he was sitting near the patient when Deputy Mamlatdar had come to record the dying declaration of the deceased because the deceased was being treated. According to him, he had given primary treatment to the deceased and that at that time three to four relatives of the deceased were present. It was also stated by the doctor that as the deceased had sustained extensive burn injuries, she was writhing in pain. However, the suggestion made by the defence that the deceased was experiencing difficulty in speaking was emphatically denied by him. According to the doctor, both the hands of the deceased above wrist were burnt and her face as well as lips were also burnt. It was also stated by him that the injuries sustained by the deceased were possible if one were to commit suicide by pouring kerosene over head and then setting oneself on fire. What was maintained by the doctor in his

cross-examination was that Deputy Mamlatdar had approached him at about 12.10 hours of February 6, 1996 and that he had also made endorsement in medical-case-papers that the deceased was conscious and was capable of giving her dying declaration. The doctor was asked the question as to how long the Deputy Mamlatdar had remained in the hospital and it was replied by him that it was not possible for him to state as to how long Deputy Mamlatdar had remained in the hospital without looking to the record. The suggestion made by the defence that the relatives of the deceased were present when Deputy Mamlatdar was recording dying declaration of the deceased was emphatically denied by this witness. It was also informed by the witness that after recording of dying declaration was over, he had not made any endorsement on the dying declaration. After informing the Court that he had not mentioned in the medical-case-papers as to when police Jamadar had come for the purpose of recording complaint of the deceased, it was maintained by the witness that the police Jamadar had come for the purpose of recording complaint of the deceased and in fact recorded complaint of the deceased. The witness has stated before the Court that he was not remembering whether dying declaration of the deceased was recorded by Executive Magistrate first in point of time, or whether police Jamadar had recorded complaint of the deceased, but it was maintained by the witness that he was present when Deputy Mamlatdar had obtained thumb impression of the deceased on her dying declaration. It was also stated by the doctor that after the deceased was brought before him for treatment he had informed the police about the same on telephone. The suggestion made by the defence that the Deputy Mamlatdar had caught hold of right hand thumb of the deceased and thereafter put the same on her dying declaration because the deceased was unconscious, was emphatically denied by him. It was also denied by him that he was a party to fabrication of dying declaration of the deceased at the instance of Deputy Mamlatdar, police and relatives of the deceased.

This is all what transpires from the testimony of the Doctor.

11. The most striking feature of testimony of the doctor is that his assertion that, on being asked, the deceased had narrated history of assault and informed him that the appellant had poured kerosene over her and set her ablaze has totally gone unchallenged. The fact that this part of evidence of doctor is not challenged in his cross-examination is admitted by the learned counsel of the appellant. It is well settled that where evidence of

witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. The assertion of the doctor that the deceased had narrated history of assault before him gets corroboration from contemporary documents on record, which is in the form of certificate of injuries of the deceased. Exh.29 is certificate of injuries issued by Dr.Bhogilal. Therein, history of assault as narrated by the deceased is recorded and it shows in no unclear terms that the deceased had stated before the doctor that the appellant had poured kerosene over her and set her ablaze. What is important to notice is that in the certificate it is also mentioned that the deceased was conscious, cooperative and oriented. The endorsement made by the doctor, who had examined the deceased personally, would show that not only the deceased was conscious and cooperative, but oriented, which means that she was capable of understanding the questions put to her and giving answers to them after understanding the questions. As assertion of the doctor that the deceased had narrated history of assault has gone totally unchallenged, this Court is of the view that the case against the appellant stands proved by the evidence of Dr.Bhogilal Amthalal, which is of sterling quality. The suggestion made by the defence that the doctor was party to concoction of the dying declaration of the deceased in connivance with police, Deputy Mamlatdar and relatives of the deceased, could not be even remotely probabilised. It may be stated that the deceased was belonging to a lower strata of the society and was such an unfortunate lady that all her relatives including her husband had deserted her after her death. Therefore, there was nothing special in her case, on the basis of which doctor was interested in her and was out to implicate the appellant falsely. Nothing could be brought on record which would suggest that the doctor, who had recorded history of assault as narrated by the deceased, was on inimical terms with the appellant. Therefore, this Court is of the firm opinion that on the basis of testimony of Dr.Bhogilal Amthalal itself the well-founded conviction of the appellant under Section 302 I.P.C. can be and should be upheld by this Court.

12. Over and above the dying declaration proved by Dr.Bhogilal, there is another dying declaration of the deceased recorded by witness Rasiklal Jivabhai Patel, who was then Executive Magistrate and who had gone to hospital for recording dying declaration of the deceased after receiving yadi from the police. The testimony of this witness is recorded at Exh.12. His evidence would show that he was discharging duties as Deputy Mamlatdar and Executive Magistrate at Visnagar since 1994.

According to him, on February 6, 1996 he had received a yadi at about 12.05 hours from Visnagar Police Station requesting him to record dying declaration of Manjulaben Ramaji. The Executive Magistrate has stated that he had mentioned the time and date of receipt of yadi on yadi itself. The yadi received by him was produced by him at Exh.13 on the record.

According to the Executive Magistrate, on the basis of this yadi he had gone to General Hospital, Visnagar and first of all met the doctor who was on duty. According to him, he had tried to ascertain from the doctor as to whether Manjulalben was conscious and was able to speak. What is stated by the witness is that therefore, the doctor had gone near the deceased and after examining her, had informed him that the deceased was able to give replies. The witness has further stated that an endorsement to the effect that the deceased was conscious was made by the doctor on the yadi which was received by him from Visnagar Police Station. The paper-book does not contain Exh.13. Exh.13 is an important document in the case and, therefore, this Court proposes to reproduce the same at this stage. Free english translation of Exh.13, which is in Gujarati language, reads as under :

"To
The Respected Executive Magistrate, Visnagar

With respect, Visnagar Police Station Officer reports that in the diary maintained at Visnagar Police Station, Entry No.18/96 is made at 23.30 hours of 5.2.1996, wherein it is mentioned that a yadi written by Dr.Bhogilal Amthalal Patel was received indicating that Thakor Manjuben Ramaji, aged 30, residing at Sundhia, Taluka : Kheralu, is admitted in the hospital and is being treated for severe burn injuries and that it is necessary to record her dying declaration. Therefore, you are requested to go to the Government Hospital and record her dying declaration.

Date : 5.2.96
Police Station Officer
Visnagar
Received on 6.2.96 at 00.05 A.M.

The patient is conscious and capable of giving answers.
B.A.Patel
6.2.96, 00.10 A.M.

Doctor"

What is maintained by the witness is that thereafter he had gone near the deceased and after asking the relatives who were near the deceased to go out of the room, had recorded the dying declaratiion of the deceased. According to the Executive Magistrate, he had started recording dying declaration of the deceased at 12.10 hours of February 6, 1996. It was also mentioned by the Executive Magistrate that he had recorded dying declaration of the deceased in questions and answers form and that after recording of dying declaration was over, he had read over the same to the deceased and thereafter the deceased had put her right hand thumb impression on the same. The dying declaration of the deceased was produced by this witness at Exh.14.

In cross-examination by the defence, it was informed by the Executive Magistrate that he had recorded about fifty dying declarations. What was maintained by the Executive Magistrate in his cross-examination was that first of all he had seen the doctor in his office after reaching hospital and that he had talk with the doctor. The witness has further informed the Court that when he had gone near the deceased, about two relatives of the deceased were present and that the deceased had sustained burn injuries on face, thigh, hands etc. According to this witness, after the doctor had examined the deceased and informed him that the deceased was conscious, he had asked the doctor to make endorsement and, therefore, the doctor had made endorsement on the yadi in Gujarati language. It was also stated by the Executive Magistrate that for the purpose of recording dying declaration he had taken with him two to four blank papers and that he had not written any questions in advance at all. It was again asserted by the Executive Magistrate in cross-examination that he had recorded dying declaration of the deceased in questions and answers form and that he had recorded dying declaration in the language of the deceased. It was asserted by the Executive Magistrate that Manjuben was an illeterate rustic woman and that he had recorded dying declaration while sitting on a stool. A question was put to the Executive Magistrate as to how many cots of patient were there in the Ward where the deceased was admitted for treatment, but the doctor was not able to specify the exact number of cots, nor was able to give particulars as to whether those cots were occupied by patients or not. The suggestion made by the defence that he had obtained endorsement of doctor on yadi after recording of dying declaration was over, was emphatically denied by him.

The Executive Magistrate had admitted that the deceased was writhing in pain when her dying declaration was recorded, but the suggestion made by the defence that she was groaning in pain was denied by him. The witness has admitted that it was true that the deceased was not giving reply in the manner in which a healthy person would give. It was also admitted by him that the deceased was giving reply slowly and that he was required to repeat the questions. However, the suggestion made by the defence that the deceased was not able to put her thumb impression on the dying declaration was emphatically denied by him. It was also denied by him that the dying declaration was concocted later on and that the deceased was not in a position to speak anything. The case of the defence that he had prepared in advance the dying declaration as desired by police and thereafter obtained thumb impression of the deceased thereon, was also emphatically denied by him.

As noted earlier, the Executive Magistrate has produced dying declaration of the deceased recorded by him at Exh.14. Free english translation of Exh.14, which is in Gujarati language, reads as under :-

"Recording of dying declaration started on 6-2-96 at 00.10 hours.

What is your name? : Manjuben Thakor

What is your husband's name? : Ramaji Mansangji Thakor

What is your age? : About 30 years.

When your marriage took place? : Before about 8 Years

Where are you staying? : At in-laws house at Sundhia, Taluka : Kheralu

Who are your family members? : Husband, wife & three minor daughters.

Whether mother-in-law, sister-in-law, elder brother of your husband, wife of elder brother of your husband, younger brother (wife of elder brother of of your husband, wife of younger husband) are residing with brother of your husband, sister : Mother-in-law and father-in-law are not alive, Jeth (elder brother of husband) and Jethani their family in the village,but

of your husband, are residing away from our house. Sisters of
with you? : my husband are married and are
residing at the house of their
in-laws. My husband has no
younger brother.

What has happened ? : I have received burn injuries.

How did you receive burn : At about 8.00 P.M. of February
injuries? : 5, 1996 Thakor Viramji Mahotji,
who is residing near my house,
poured kerosene over me and set
me ablaze.

What had happened ?
Why were you set on fire ? : On February 4, 1996, a
religious discourse in front of
house of Thakor Kavaji, whose
father's name I do not know,
was arranged in our Maholla.
At that time, our nephew Thakor
Viramji Mahotji had come near
me and demanded to have sex
with him, but I had turned down
the proposal. Therefore, on
February 5, 1996 he had
quarrelled with me for the
whole day. Ultimately, at
about 8.00 P.M. on 5.2.96,
Thakor Viramji had come to my
house and after pouring
kerosene over me, had set me on
fire.

Who was present at the time when At about 8.00 P.M. of 5.2.96
the incident had taken place ? my husband had gone to dairy
How incident had taken place ? : situated in the village for
delivering milk. I alongwith
my three daughers was sleeping
in the house. At that time,
Thakor Viramji Mahotji had come
inside my house with kerosene
and after dragging me out of
the house, had poured kerosene
over me and ran away after
setting me ablaze. At the time
of incident, no one, except my

daughters who were sleeping, was present. As I was set on fire, I had raised shouts as a result of which, people residing nearby as well as my husband who had received message, had come to my rescue and extinguished the fire. Thereafter I am brought to the hospital.

Where is your paternal house?
Do you have any problem from
paternal house ? : My paternal house is situated at Vadodara. I do not have any problem from my paternal house.

Had you any quarrel with anyone else, except the quarrel which is referred to above ? : I had no quarrel with anyone nor altercation.

Is there any other reason for
receiving burn injuries ? : As stated above, Thakor Viramji Mahotji has set me on fire. Except that, there is no other reason.

Are you literate ? : No

The reply as recorded above is stated by me in conscious condition and is read over to me, and in token thereof I have placed my right hand thumb impression on it to show that the same is correct.

Time of completion of recording of dying declaration : Date :6.2.96, Time : 00.45 hours.

Place : General Hospital,
Visnagar.

In presence;
Executive Magistrate,
Visnagar

Right hand thumb impression
of Thakor Manjuben Ramaji."

13. On reappreciation of evidence of the Executive Magistrate recorded at Exh.12, this Court is of the firm opinion that the Executive Magistrate had recorded dying declaration of the deceased in discharge of his official duty. The contents of dying declaration would show that certain facts were within the special and exclusive knowledge of the deceased and could not have been imagined by the Executive Magistrate. The testimony of Executive Magistrate shows that before recording dying declaration of the deceased he had ascertained from the doctor, who was on duty, as to whether the deceased was conscious and capable of giving answers. His testimony further shows that thereupon the doctor had examined the deceased and after examining the deceased, the doctor had told him that the deceased was conscious and capable of giving answers. It is also stated by this witness that he had obtained endorsement from the doctor on the yadi to the effect that the patient was conscious and in a position to give answers. The testimony of Executive Magistrate stands completely corroborated by reliable testimony of Dr.Bhogilal Amthalal examined by the prosecution at Exh.28. Further, the testimony of Executive Magitrate also stands corroborated by contemporary document i.e. Exh.13. The Executive Magistrate has frankly stated that the deceased was writhing in pain and was, therefore, replying slowly. If it had been the intention of the Executive Magistrate to concoct dying declaration, he would not have stated that the deceased was giving answers slowly after understanding the questions which were required to be repeated by him. The plea that the deceased had sustained burn injury on thumb of her right hand and, therefore, could not have placed her right hand thumb impression on the dying declaration, is devoid of merits. As observed earlier, the Executive Magistrate has clearly stated that after recording of dying declaration was over, the deceased had put her right hand thumb impression on the dying declaration.

Dr.Bhogilal Amthalal, examined at Exh.28, has also categorically stated that he was present when the deceased had put her right hand thumb impression on the dying declaration. The testimony of Dr.Bhogilal Amthalal shows that the deceased had received burn injuries above wrist of right hand. This fact is also mentioned by him in contemporary record i.e. certificate of injuries of

the deceased which is produced by the prosecution at Exh.29. Therefore, this Court has no reason to disbelieve the claim advanced by the Executive Magistrate that the deceased had put her right hand thumb impression on the dying declaration after recording of the same was over. It is true that in the postmortem notes produced by the prosecution at Exh.10 it is mentioned in Column 17 that the deceased had sustained I & IInd degree burns over chest, both upper limbs, left thigh, face about 50%. However, burn injuries on both upper limbs will have to be read in light of the sworn reliable testimony of Dr.Bhogilal Amthalal, who had opportunity of treating the deceased at the earliest point of time and who in no uncertain terms has stated on oath that the deceased had received burn injuries above wrist of her right arm. It is also relevant to notice suggestion which was made by the defence to Dr.Bhogilal. It was suggested to the Doctor that relatives of the deceased were present at the time when dying declaration of the deceased was recorded by the Deputy Mamlatdar. However, this suggestion is denied by him. This suggestion made to the Doctor would show that it was almost accepted by the defence that the Deputy Mamlatdar had recorded dying declaration of the deceased and that the Doctor was also present at that time. Thus, there is no manner of doubt tht the deceased had put her right hand thumb impression on the dying declaration in token of having made the same.

14. There is yet third dying declaration on record, which is in the form of complaint recorded by witness Shambhuji Pradhanji, who was then discharging duties as 2nd Grade Jamadar at Visnagar Police Station. His testimony, which is recorded at Exh.21, shows that on February 6, 1996 he was on duty at Visnagar Police Station and that P.S.O. of Visnagar Police Station had informed him in writing at about 23.30 hours that a lady named Manjuben Ramaji Mansangji, residing at village Sundhia, had received burn injuries and was admitted in Civil Hospital for treatment and that he should take further steps in the matter. The witness has informed the Court that on receipt of the said intimation he had gone to Visnagar Hospital and met the injured. According to him, the deceased had received burn injuries on her whole body, but was capable of talking, as a result of which he had recorded her statement. What is mentioned by the witness before the Court is that after recording of her statement was over, it was read over to her and thereafter he had obtained right hand thumb impression of the deceased on the statement and he himself had also signed the same. The witness produced the statement of the deceased as recorded by him at Exh.22.

In his cross-examination, it was stated by him that he had gone to the hospital at about 12.00 hours. In the next sentence it was stated by him that he had gone to the hospital at about 12.05 hours. It was mentioned by the witness in his cross-examination that when he had gone to the hospital, relatives or leaders of the community to which the deceased was belonging were not present. According to him, before meeting the deceased he had met the doctor. What was mentioned by the witness was that dressing was applied on the face, hand and leg of the deceased and that he had stayed at the hospital for half an hour and when he was in the hospital, no one had come near the deceased. According to him, he had not gone to call Mamlatdar. The suggestion made by the defence that the people belonging to complainant side were his relatives was emphatically denied by him, though it was admitted by him that he had some relatives staying at village Sundhia. The suggestion made by the defence that the deceased was severely burnt and was unconscious as well as not able to speak, was also emphatically denied by him. It was also denied by him that he had conspired with leaders of the village and written down the statement of the deceased as desired by them and had thereafter obtained thumb impression of the deceased thereon.

As observed earlier, this witness has produced the complaint of the deceased at Exh.22. Free english translation of Exh.22, which is in Gujarati language, reads as under :

"Date : 6-2-96

My name is Manjuben, wife of Ramaji Mansangji Thakor, aged 30 years, my occupation : household and I am residing at Sundhia, Taluka : Kheralu.

On being asked in person I state that I am residing at the above mentioned place with my husband and children. My paternal house is situated at village Gadhamani, Taluka & District : Vadodara. My marriage had taken place before about 8 years with Tha. Ramaji Mansangji of Sundhia. I have three daughters, and name of eldest is Savitaben, name of younger to her is Surekha and name of the youngest daughter is Gita. My mother-in-law and father-in-law are not alive. My

husband is doing agricultural work and maintaining the family.

On the night of day prior to yesterday I was sleeping with my daughters and my husband had gone out. At that time, Thakor Viramji Mahotji, residing in our Maholla, had approached me and demanded to have sex with him. I had rejected his proposal. Therefore, this Thakor Viramji Mahotji was annoyed with me and had told me that at that time he was going, but he would set her ablaze if his desire was not satisfied. Thereafter, yesterday i.e. on 5.2.96 my husband had gone to dairy for delivering milk. At about 8.00 P.M. Thakor Viramji Mahotji had come near me with a Can. He had opened the cork of the Can in which kerosene was filled. He had thereafter poured kerosene over my clothes and after taking out a matchstick, had ignited the same and set my clothes on fire, as a result of which my clothes had caught fire. I had raised shouts and, therefore, Thakor Viramji Mahotji had run away from the place of incident. Because of shouts raised by me, my husband, Thakor Bakaji Sartanji and Thakor Babiben Sartanji as well as others had come and extinguished the fire with the help of quilt. I have received burn injuries from waist to head. Therefore, I was placed in a matador and brought to Visnagar hospital for treatment. At present I am under treatment and conscious.Therefore, appropriate action be taken against Thakor Viramji Mahotji.

Right hand thumb impression of
Thakor Manjuben, wife of
Ramaji Mansangji.
Before,
Civil Duty Head-Constable
Visnagar."

15. The reassessment of testimony of witness Shambhuji makes it evident that he had gone to Civil Hospital in discharge of his official duty after receipt of written intimation given by P.S.O. of Visnagar Police Station. His evidence shows that he had approached the deceased who was admitted in the hospital and was under treatment and he had found that she was capable to talk. It is evident from his testimony that he had not gone to the hospital for the purpose of recording dying declaration and had gone there for the purpose of recording information which might be given by the deceased. His evidence would show that he was satisfied that the deceased was conscious and in a fit state of mind to make statement and, therefore, he had recorded the information as conveyed by the deceased. Though it

was admitted by him that dressing was applied on face, hand and leg of the deceased, it was specifically asserted by him that he had recorded the information as stated by the deceased and that the deceased had put her right hand thumb impression after recording of information was over. Though this witness was searchingly cross-examined, nothing could be brought on record by the defence so as to make dent in his assertion that he had recorded information as narrated by the deceased and had thereafter obtained thumb impression of the deceased. As observed earlier, testimony of Dr.Bhogilal Amthalal recorded at Exh.28 clearly establishes that the deceased had received burn injuries above wrist of right hand. Therefore, claim of this witness that he had obtained thumb impression of the deceased on her information inspires confidence of the Court. It could not be pointed out by the defence that this police officer was on inimical terms with the appellant or was interested in the deceased. Under the circumstances, his claim that he had recorded complaint of the deceased deserves acceptance. The plea that he had recorded complaint of the deceased at 12.05 hours of February 6, 1996 belies the claim of the Executive Magistrate that he had recorded dying declaration of the deceased between 00.10 hours and 00.45 hours on February 6, 1996 and, therefore, both the dying declarations should be discarded by the Court, has no substance at all. It is true that the Head Constable has stated in his testimony that he had recorded the first information report as narrated by the deceased at 12.05 hours of February 6, 1996 and that he was present in the hospital upto 12.35 hours and that nobody had come near the deceased. However, one cannot ignore the fact that his testimony before the Court was recorded after lapse of reasonable time. The record further shows that the original papers relating to the complaint of the deceased were not available at the police station and, therefore, the learned A.P.P. had submitted purshis at Exh.5 on July 25, 1996 mentioning, inter alia, that the original police papers were missing from the police station and, therefore, permission to reconstruct the same be granted. The learned Judge had allowed the said application and granted permission as prayed for by the learned A.P.P. Thus, at the time of tendering evidence, witness Shambhuji had no advantage to referto the original record. The record also establishes that after registration of the complaint, a report as contemplated by Section 157 of the Code of Criminal Procedure was forwarded to the learned Judicial Magistrate, First Class, Kheralu, which was received in the Court on February 6, 1996 at 11.00 A.M. Therein, it is mentioned

that the information was recorded on February 6, 1996 at 4.30 hours. This clinchingly shows that the first information report was recorded later on after dying declaration of the deceased was recorded by the Executive Magistrate. Therefore, the plea that the dying declaration as well as information of the deceased could not have been recorded at the same time and, therefore, both the dying declarations should be ignored from consideration, cannot be accepted.

16. On close scrutiny of three dying declarations, which are produced by the prosecution, this Court finds that all the three dying declarations are consistent with each other. No important part of any of the dying declarations is demonstrated to be false with reference to other evidence on record. The plea raised by the learned counsel of the appellant that the assertion made by the deceased in her dying declaration, which was recorded by the Executive Magistrate, to the effect that she was dragged out of her house, after which the appellant had poured kerosene over her body and set her on fire is false, inasmuch as panchnama of place of occurrence does not establish that any trace of kerosene was found outside the house and, therefore, dying declaration should be disbelieved, is merely stated to be rejected. This Court has closely scrutinised the contents of panchnama of place of occurrence produced by the prosecution at Exh.17. A bare reading of the same makes it evident that the room in which the deceased was sleeping with her daughters is a small one and height of the floor from ground is hardly about 9 ft. The panchnama does not indicate that any soot was found on the roof of the room. If she had been set on fire in the room itself, then soot would have been found on the roof of the room. Further, no other articles lying in the room were affected/damaged by the fire, which indicates that incident had taken place as narrated by the deceased in her dying declaration. The evidence tendered by relatives of the deceased, who have turned hostile, also shows that deceased was burning outside her house and that fire on her was extinguished with a quilt. Therefore, it is wrong to suggest that a part of the dying declaration recorded by the Executive Magistrate stands contradicted with reference to the contents of panchnama of place of occurrence. Even if the Court comes to the conclusion that the statement made by the deceased before the Executive Magistrate to the effect that she was dragged out of her house after which kerosene was poured over her body and she was set on fire is found to be erroneous or contrary to the contents of panchnama, that fact by itself would not justify

rejection of the whole of the dying declaration of the deceased. The material part of the dying declaration of the deceased stands corroborated by other two dying declarations and, therefore, that seperable part of the dying declaration, which is corroborated by other two dying declarations, can certainly be relied upon by the Court. This is so, in view of decision in Godhu and another v. State of Rajasthan, AIR 1974 SC 2188. In the said case, deceased had said in his dying declaration that he was forcibly dragged inside the room by the accused and that the accused had shot at him. On appreciation of evidence it was found that story of forcible dragging was not proved. It was argued before the Supreme Court that as part of the dying declaration was not proved to be correct, the whole dying declaration should be rejected. While negativing said contention, the Supreme Court has made following pertinent observations in Para-16 of the reported decision :

"16. We are also unable to subscribe to the view that if a part of the dying declaration has not been proved to be correct, it must necessarily result in the rejection of the whole of the dying declaration. The rejection of a part of the dying declaration would put the court on the guard and induce it to apply a rule of caution. There may be cases wherein the part of the dying declaration which is not found to be correct is so indissolubly linked with the other part of the dying declaration that it is not possible to sever the two parts. In such an event the court would well be justified in rejecting the whole of the dying declaration. There may, however, be other cases wherein the two parts of a dying declaration may be severable and the correctness of one part does not depend upon the correctness of the other part. In the last mentioned cases the court would not normally act upon a part of the dying declaration the other part of which has not been found to be true, unless the part relied upon is corroborated in material particulars by the other evidence on record. If such other evidence shows that part of the dying declaration relied upon is correct and trustworthy, the court can act upon that part of the dying declaration despite the fact that another part of the dying declaration has not been proved to be correct."

Applying the principles laid down by the Supreme Court in the above-quoted decision to the facts of this case, this Court finds that material part of the dying declaration recorded by the Executive Magistrate stands corroborated by oral dying declaration made by the deceased before Dr.Bhogilal Amthalal as well as first information report of the deceased as recorded by witness Shambhuji Pradhanji and inspires confidence of this Court. The evidence tendered by the prosecution in form of three dying declarations made by the deceased is cogent, consistent and trustworthy. The deceased was in a position to identify the appellant as assailant. The version narrated by the deceased in her dying declarations in intrinsically sound and accords with probabilities. This Court is, therefore, of firm opinion that the learned Judge of the trial Court did not commit any error in placing reliance on three dying declarations of the deceased for convicting the appellant. The three dying declarations produced by the prosecution establish beyond reasonable doubt that on February 5, 1996 at about 8.00 P.M. the deceased was in her hose and that the appellant after going to her house had poured kerosene over her and set her ablaze, as she had turned down his proposal to have sex with her and thereby caused her death.

17. This brings the Court to consideration of evidence of other witnesses adduced by the prosecution. It may be stated that in order to bring home guilt of the appellant, the prosecution had examined three witnesses, namely, Ramaji Mansangji, PW.2 at Exh.11, Bakaji Sartanji, PW.4 at Exh.15, and Sartanji Mansangji, PW.5 at Exh.16. All the three witnesses have turned hostile to prosecution. It is well settled that simply because a witness has been declared hostile, his testimony does not become totally unreliable on that count. The evidence given by such witness remains admissible and there is no legal bar to pass conviction upon his testimony, if corroborated by other reliable evidence. The evidence of a witness hostile to prosecution should not be totally rejected if spoken in favour of the prosecution or accused, but it can be subjected to close scrutiny and that portion of his evidence which is consistent with the case of the prosecution or defence may be accepted by the Court. In light of these principles, the Court proposes to discuss the testimony of abovenamed three witnesses.

18. Witness Ramaji Mansangji, whose evidence is recorded at Exh.11, has stated in his testimony that name of his wife was Manjuben and that he has two daughters. According to him, the appellant was his family nephew and

was residing at a distance covered by two fields. According to him, in the night of previous day of the incident, the appellant had come out of his house and at that time he was not present in the house, but his wife was present in the house. What is stated by the witness was that the appellant had come without any reason and that his wife had not told him anything. It was further stated by the witness that on the day of the incident he had gone to dairy for the purpose of delivering milk and when he had returned to his house at about 8.00 P.M. he had found that his wife was burning outside his house and, therefore, he had extinguished the fire by covering the deceased with a quilt. It was further mentioned by the witness that he had taken his wife to Visnagar Hospital for treatment, from which he had taken his wife to Ahmedabad and at Ahmedabad the deceased had died on 3rd day. What was mentioned by the witness before the Court was that the deceased had received burn injuries because of the incident which had taken place on the day previous to the day of incident. According to him, his wife was not talking anything and had not talked with anyone. It was also stated by the witness that though several persons had collected at his house, the deceased had not talked with anyone. What was stated by the witness was that when his wife was removed to the hospital, police had arrived, who had interrogated his wife and at that time he was asked to leave the room. It was also stated by him that he was also interrogated by the police.

Naturally, this witness had not supported the prosecution case wholehog and, therefore, the learned A.P.P. had sought permission of the Court to cross-examine him. After grant of permission the witness was confronted with his police statement, but he had denied that the statements confronted were made by him in his police statement. It is well to remember that the testimony of Mr.G.K.Desai, who is investigating officer, proves that the statements with which the witness was contronted during his cross-examination by the learned A.P.P. were made by him in his police statement. Thus, contradictions stand proved. Though this Court is aware of the principle that statements made by a witness in his police statement can never be used as substantive evidence in a criminal trial, the fact remains that contradictions appearing in the testimony of Ramaji stand proved by the reliable testimony of the investigating officer Mr.Desai. In his cross-examination it was stated by the witness that after the deceased was removed to Visnagar Hospital, she had become unconscious and was not in a position to speak till she had died. It was further

stated by the witness in his cross-examination that the fact that his wife had become unconscious and was not in a position to speak was mentioned by him before the police. It was also admitted by him that he had not stated in his police statement that the deceased had received burn injuries because of the incident which had taken place on the day prior to the day of the incident.

19. A fair assessment of testimony of witness Ramaji, who is husband of the deceased, makes it evident that he had deserted and betrayed her. However, truth has tendency to come out. This witness has in terms stated that when his wife was removed to hospital, police had arrived and interrogated his wife. Wife of this witness could have been interrogated only if she was ableto speak. This means that not only the deceased was conscious and capable to speak, but the information as narrated by her was also recorded by police officer. His claim that he had seen the appellant coming out of his house on the night of previous day of the incident corroborates the statement made by the deceased in her dying declaration which was recorded by the Executive Magistrate. Further, the claim made by this witness that the deceased had received burn injuries because of quarrel which had taken place on the day prior to the day of incident also corroborates part of the dying declaration made by the deceased before the Executive Magistrate. Thus, though this witness has turned hostile to prosecution, this Court finds that close scrutiny of his evidence lends corroboration to prosecution case.

The testimony of witness Bakaji Sartanji recorded at Exh.15 would show that Ramaji, who was husband of the deceased, was his uncle and that the deceased was his aunt. According to him, at the time of incident he was going to his own house on a cycle and on hearing shouts near the house of his uncle he had gone there and found that his aunt had received burn injuries. It was stated by the witness that his aunt was removed to Visnagar hospital from where she was taken to Ahmedabad and that his aunt had expired after 5 to 6 days. It was claimed by the witness that his aunt was not able to speak and that she had no talks with him. This witness was also permitted to be cross-examined by the learned A.P.P. and during his cross-examination he was confronted with the statements made by him in his police statement. It was also mentioned by the witness that the appellant was his brother, but had denied the suggestion of the learned A.P.P. that he was deposing falsely before the Court because the appellant was his brother. In his cross-examination by the defence, it was stated by the

witness that the deceased was not speaking anything while being removed to hospital. This Court finds that when Ramaji, who is husband of the deceased, has not supported the prosecution case, this witness, who is brother of the appellant, is bound to turn hostile and this Court is not surprised when he has not supported the prosecution case. However, it would be relevant to refer to testimony of Sartanji Mansangji recorded at Exh.16. This witness has also stated that he is brother of Ramaji, who is husband of the deceased and that he was not knowing as to how the deceased had received burn injuries. According to him, the deceased was removed to Visnagar hospital in a tractor, but the deceased was not speaking anything. It was claimed by this witness before the Court that he had no talk with the deceased and that the deceased was removed to Ahmedabad where she had expired after three days. During his cross-examination by learned A.P.P., this wintess was confronted with the statements made by him in his police statement, which stands proved by the reliable testimony of investigating officer Mr.Desai. However, what was stated by this witness during the course of his cross-examination by the learned A.P.P. was that the appellant was his nephew and that a compromise was arrived at.

The real reason as to why the husband and other close relatives have not supported the prosecution case has come out in the testimony of witness Sartanji, which makes it clear that a compromise had taken place between the husband and other relatives of the deceased on one hand and the appellant on the other. It appears that the husband of the deceased had no grievance regarding cruel death of his wife and had pleasantly compromised the matter with his nephew. Such a course can never be approved or sanctioned by a Court of law and is rightly deprecated by the learned Judge of the trial Court. Therefore, though testimony of two witnesses, namely, Bakaji and Sartanji is in favour of the defence, the same cannot be relied upon at all, inasmuch as they have no regard for truth and have deposed falsely before the Court because issue of murder of the deceased was compromised with the appellant.

20. The net result of the above discussion is that the prosecution has proved its case beyond reasonable doubt that the appellant had poured kerosene over the deceased and set her ablaze and thereby caused her death. The finding recorded by the learned Judge of the trial Court, who had opportunity of observing demeanour of the witnesses, is eminently just and is hereby upheld.

21. The last contention advanced by the learned counsel of the appellant that the appellant had no intention to cause death of the deceased and, therefore, after converting the conviction of the appellant from Section 302 I.P.C. to one punishable under Section 304 Part-I I.P.C., the Court should impose punishment which is already undergone by him, has no substance whatsoever. While considering this plea, it would be advantageous to refer to relevant clauses of Section 300 I.P.C. which are as under :

"300. Murder : Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly;- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly;- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly;- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

A bare reading of the above-quoted provisions makes it very clear that culpable homicide is murder if the act by which the death is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. Clause Secondaly of Section 300 has been interpreted and explained by the Supreme Court in State of Andhra Pradesh v. Rayavarapu Punnayya and another, AIR 1977 SC 45. According to the Supreme Court, intention to cause death is not an essential requirement of Clause(2). What is ruled by the Supreme Court in the said decision is that only the intention of causing bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the

particular victim is sufficient to bring the killing within the ambit of this clause. Applying the principle laid down by the Supreme Court in the said case to the facts of the present case, this Court is of the opinion that the intention of the appellant was to cause bodily injury coupled with his knowledge of likelihood of such injury causing the death of the deceased. When a person pours kerosene over another and sets the said person on fire, the person pouring kerosene and setting another person on fire can be attributed the knowledge that there was likelihood of injury causing death of the person on whom kerosene was poured and was thereafter set on fire. Therefore, instant case would be governed by clause Secondly of Section 300. In Patel Hiralal Joitaram v. State of Gujarat, 2002(1) GLR 248 (S.C.), accused had set the deceased ablaze after soaking her clothes with inflammable liquid. It was urged before the Supreme Court that the offence would not escalate beyond culpable homicide not amounting to murder. Negativing the said contention, Supreme Court has held that accused would know that such an act was likely to cause death and case would certainly fall within Clause 2ndly of Section 300 I.P.C. Thus, this Court is of the firm view that conviction of the appellant under Section 302 is not erroneous and he cannot be convicted under Section 304 Part-I or Part-II as suggested by his learned counsel. Even otherwise, cause of death as mentioned by the doctor, who had performed autopsy on the dead body of the deceased is shock as a result of extensive burns about 50%. When a person receives burns of about 50%, in the ordinary course of nature the burn injuries would cause death of that person. Though the doctor has not specifically stated in her testimony that the burn injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death of the deceased, this Court, having regard to the nature of injuries sustained by the deceased and the circumstances appearing from the case, can certainly deduce that the injuries which were received by the deceased were such which were sufficient in the ordinary course of nature to cause her death. Therefore, Clause Thirdly of Section 300 would also be attracted to the facts of the case. Even the provisions of Clause Fourthly also cannot be overlooked by the Court. The scope and ambit of Clause Fourthly has been interpreted by the Supreme Court in State of Madhya Pradesh v. Ram Prasad, AIR 1968 SC 881. According to the Supreme Court, Clause Fourthly is usually invoked in those cases where there is no intention to cause the death of any particular person, (as the illustration shows) the clause may on its terms be used in those cases where there is such callousness towards the result and

the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. What is ruled by the Supreme Court is that since no special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person, it is obvious that the accused must have knowledge that he was running the risk of causing the death of the victim or such bodily injury as was likely to cause death, and if he has no excuse for incurring that risk, the offence must be taken to fall within Fourthly of Section 300 Penal Code. In other words, according to the Supreme Court, this offence would be culpable homicide amounting to murder even if he does not intend causing the death. What is highlighted by the Supreme Court in the said decision is that setting fire to the clothes of another is an act so imminently dangerous that it is in all probability likely to cause death or to result in an injury that was likely to cause death and, therefore, clause Fourthly would be applicable. Applying the principles laid down by the Supreme Court in the above-quoted decision to the facts of the present case, this Court finds that no special knowledge is needed for the appellant to know that he might cause death by setting fire to the clothes of the deceased. It will have to be held that the appellant had known that he was running the risk of causing the death of the deceased, or such bodily injury as was likely to cause her death. He had no excuse for incurring that risk. Therefore, the offence committed by him must be taken to fall within Clause Fourthly of Section 300 of the Indian Penal Code. Thus, it is difficult for the Court to agree with the submission made by the learned counsel of the appellant that the offence committed by the appellant is not punishable under Section 302 I.P.C., but is one punishable under Section 304 Part-I I.P.C.

22. The result of above discussion is that this Court finds no merits in the appeal and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

( J.R.Vora,J.)

(patel)